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No. 316

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

MICHAEL ZOBEL

Petitioner

vs.

STATE OF SOUTH DAKOTA

Respondent

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

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CITATIONS

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Parkston where she died on November 21, 1962. At the time of her death, Patty Sue was 21 months old, while Rose Marie had obtained the age of 4 years at the time of her death. Both girls died as a result of injuries to the brain caused by blows to the head. (T.R. 113, 140) Doctor James Vose performed the post-mortem examination upon the body of Patty Sue Zobel. He stated that upon making this examination he found that the body was that of an emaciated girl; that the weight was 12½ pounds; and that there were numerous marks of violence present upon the skin surface of the scalp, face, forehead, shoulders, ears, back and buttock. He stated that it was his opinion that it would have taken four to six months for the body to have arrived at that condition of emaciation and that the escars, or scabs, on the body were anywhere from one to four days old. (T.R. 111, 114) He further stated that the normal weight for a child of that age would be approximately 32 pounds. (T.R. 116)

Dr. John McCann examined Rose Marie at the time she entered St. Benedict's Hospital on November 9, 1962. Dr. McCann testified that the body was emaciated and contained numerous abrasions and lacerations (T.R. 124, 125) He further stated that it was his opinion, that although the malnutrition or the skinny condition of Rose Marie was not a primary cause of her death it could have been a contributing cause. (T.R. 135)

Dr. Arnold A. Myrabo, a pathologist, performed the autopsy upon the body of Rose Marie Zobel. He described the body of Rose Marie as a "four year old female, weighing fifteen pounds, being extremely emaciated, rather numerous atrophic scars about the body, too numerous to mention, the majority being confined to the back and head." He further stated that the death was due to meningitis or infection of the lining of the brain and brain abscess secondary to an infected hemotoma or blood clot on the left side of the brain, caused by blunt force. (T.R. 139, 140) He further stated that the normal weight of a child that age would be approximately 35 pounds. (T.R. 142)

Annabella Zobel, wife of the defendant, was arrested for the death of Patty Sue by the sheriff on November 10, 1962, and the defendant was arrested on November 13, 1962. (T.R. 75, 76)

The Zobels were charged upon information with two counts of murder as follows:

"That on or about the 9th day of November, 1962, in the County of Hanson, State of South Dakota, Michael Zobel and Annabella Zobel, did then and there wilfully, unlawfully and feloniously with malice of forethought, murder Patty Sue Zobel, a human being and did thereby commit the offense of murder, and

"That on or about the 21st day of November, 1962, in the County of Hanson, State of South Dakota, Michael and Annabella Zobel did then and there wilfully, unlawfully and feloniously, with malice of forethought, murder Rose Marie Zobel, a human being, and did thereby commit the crime of murder."

The venue was changed from Hanson to Davison County, South Dakota, at the request of the defendant.

On May 25, 1963, a Davison County, South Dakota jury, returned a verdict of guilty against the petitioner for two counts of second degree manslaughter for the deaths of Patty Sue and Rose Marie Zobel. On May 29, 1963, the defendant was sentenced under this conviction.

On the 5th day of April, 1965, the Supreme Court of the State of South Dakota, confirmed the conviction. (State of South Dakota vs. Michael Zobel, 134 N.W.2d 101)

The defendants had moved for separate trials and after the conviction of defendant Michael Zobel, a Davison County, South Dakota jury found Mrs. Zobel not guilty, by reason of insanity, and she is presently confined in the Yankton State Hospital for the mentally ill, which hospital is located in Yankton, South Dakota.

CONFUTATION OF CASES CITED BY PETITIONER

A reading of the six cases cited by petitioner has caused the respondent to conclude that none of these cases, with the exception of Mapp v. Ohio, (1961) 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, are in point in reference to the case at bar and do not support the proposition or contention of the petitioner for which they are cited. We would call the attention of the Court to the fact that the petitioner has cited Coco v. U.S., 389 F. 33, whereas the correct citation should be 289 F. 33. Also the case of Graves v. U. S. should read Gray v. U.S.

QUESTIONS PRESENTED

The arguments and authorities of respondent will be presented in the same order as the questions are presented by the petitioner.

REASONS FOR DENYING THE WRIT

The respondent asserts that a writ of certiorari should not be granted in this case.

The only basis for the petition in the case at bar is the petitioner's claim that:

(1) He was convicted of the crime of second degree manslaughter, which he claims is not a lesser included offense of the charge of murder. In support of this contention, the petitioner merely parrots the language used by Judge Homeyer of the South Dakota Supreme Court. (Questions Presented 1, 3, 4)

(2) Allegedly, one of the prosecuting attorneys violated a confidential relationship with one of his former clients. (Petitioner's Questions Presented 2.)

(3) Certain exhibits which petitioner alleges were obtained by means of an illegal search and seizure were admitted into evidence. (Petitioner's Questions Presented 5.)

To refute petitioner's questions presented 1, 3 and 4, respondent asserts that the sole basis for petitioner's arguments therein, is the following language taken from the dissenting opinion of Judge Homeyer, as follows:

> "This court is committed to the rule set forth in States v. Bates, 65 S.D. 105, 271 N.W. 765, in second degree manslaughter cases. It should not be ignored. Negligence to be sufficient to support a criminal action must be something more than mere inadvertence. 'There must be some action from which the jury might reasonably infer the mens rea.' In order to give rise to this mens rea, the jury must find as a fact that the defendant intentionally did something which he should not have done or intentionally failed to do something which he should have done under such circumstances that it can be said that he consciously realized that his conduct would in all probability (as distinguished from possibly) produce the precise result which it did produce. Defendant's parental inattention is not condoned. Neverthless, resolving all conflicts in the evidence, and reasonable inferences therefrom, in support of his guilt, I am satisfied that it

does not meet the criminality test promulgated by this court in the Bates case."

This argument of petitioner, is forever and completely put to rest by the following statement of the majority opinion of the South Dakota Supreme Court, which says:

"Whether the verdict of second degree manslaughter can be sustained on a charge of murder and the evidence deserves attention. Homicide, murder and manslaughter in the first and second degrees are defined in SDC 13.20. Manslaughter in the second degree was held to be an offense included in both the charge of murder, State v. Hubbard, 20 S. D. 148, 104 N.W. 1120, and manslaughter in the first degree, State v. Painter, 70 S.D. 277, 17 N.W. 2d 12. See also State v. Stumbaugh, 28 S.D. 50, 132 N.W. 666; State v. Godlasky, 47 S.D. 36, 195 N.W. 832 and State v. Violett, 79 S.D. 292, 111 N.W. 2d 598, 608.

"By SDC 34.3671 whenever a crime is distinguished into degrees, the jurors must find the degree of the crime of which defendant is guilty and by SDC 34.3669 may find him guilty of any offense, the commission of which is necessarily included in that with which he is charged. In the Stumbaugh opinion Judge Corson, after reviewing many decisions stated these provisions of the code 'have been in force in the territory and state since 1865, and under these provisions many convictions have been had in this state of manslaughter in the first and second degrees, under indictments charging the offense of murder; and the propriety of instructions by the trial courts, calling attention to the lesser offenses of manslaughter in the first and second degrees, has not, to our knowledge, been before questioned.' Both State v. Hubbard and State v. Painter declare it the duty of the court to instruct as to included offenses and failure to do so to be erroneous. It would be an anomaly to require these instructions to be given and when the jury returned a verdict in compliance therewith, to set it aside.

"Other courts are in accord with our decisions. The Oregon Supreme Court under a statute similar to SDC 34.3669 upheld a conviction for mansluaghter on a charge of murder in the first degree. State v. Nortin, 170 Or. 296, 133 P. 2d 252. The court quoted from Section 653, Wharton on Homicide, (3rd Ed.) as follows: 'a verdict for a lower degree of homicide will not be set aside on the ground that the evidence does not make out that degree of the crime in terms as defined by the statute, when it would have supported a finding of a higher degree.' State v. Williams, 197 Iowa 813, 197 N.W. 991. The same thought is expressed in State v. Hubbard, supra, where the court quoted from another opinion as follows:

'In such cases the jury are the sole judges of the state of facts disclosed on the trial, which may justify them to return a verdict of manslaugter, and the court is powerless to avoid their verdict, because in its opinion the evidence called for the finding of a higher offense. The verdict under the law would be responsive to the indictment, and it should stand, although it might be illogical, unjust or unjustifiable under the evidence. Examples are not wanting of cases in which the jury have condemned some of the conspirators in a murder case for the highest offense charged, and the other conspirators for manslaughter only.'

"It is, therefore, unnecessary to consider the effect of, or measure the conduct of defendant by, the standards in SDC 13.2016. Cases like State v. Bates, 65 S.D. 105, 271 N.W. 765, are not here in point, as they involve charges and convictions brought for deaths resulting from and based on culpable negligence mentioned in SDC 13.2016. Attention is called to the interesting discussion of our first and second degree manslaugter statutes which appears in State v. Denevan, 49 S.D. 192, 206 N.W. 927."

By his question presented number 2, the petitioner has alleged that the State's Attorney violated a confidential relationship when he took the witness stand to contradict testimony of the petitioner. Petitioner would have this court believe that the State's Attorney had previously represented him, which is not true. Mrs. Zobel had been charged by petitioner with mistreating another daughter, whereupon Mr. Bleeker was retained by **Mrs. Zobel** to represent her in the trial thereon. Sometime thereafter, Mr. Bleeker was appointed State's Attorney of Hanson County, South Dakota, to fill the unexpired term of his predecessor. He was then re-elected in November of 1962.

At the trial, in the case at bar, Mr. Bleeker was called as a witness by his co-counsel, special prosecutor, Leroy Lassegard. Petitioner's attorney objected as follows:

"MR. ROUBIDEAUX: May it please the court, at this time we're going to object to this witness testifying on the ground that he is one of the actual participating attorneys in his case and that under the statute, it is improper for him to be a witness, except as to purely formal matters." (T.R. 96)

In an examination of the testimony at the trial this court will note that no further objection was made by petitioner to the testimony of State's Attorney Bleeker. No objection was raised at the trial, or before the South Dakota Supreme Court, relative to the violation of a confidential relationship.

It is provided in Sec. 36.0107 of the 1960 Supplement to the South Dakota Code of 1939, as follows:

> "When an attorney is a witness for his client upon any trial except as to merely formal matters such as the attestation or custody of an instrument or the like, he shall not further participate in such trial. This section shall not apply when such attorney's testimony is offered in answer to evidence received on behalf of the other party, and it shall appear to the satisfaction of the court that such attorney had no reason to anticipate the necessity of his being a witness. **Neither shall this section apply to state's attorneys and the Attorney General and their deputies when engaged in the discharge of official duties.**" (Emphasis supplied)

It is apparent then that is was entirely proper for State's Attorney Bleeker as an acting prosecutor, to testify in the trial of the case at bar.

Respondent asserts that inasmuch as petitioner did not object to the alleged violation of a confidential relationship at the trial and further did not raise this question upon appeal to the South Dakota Supreme Court, he is now prevented from complaining of such to this court. See Cradle v. U. S., 178 F. 2d 962, 965, cert. denied, 70 S. Ct. 624, 339 U.S. 929; and Krenbring v. U.S., 216 F. 2d 671, 672 (C.C.A., 8th Cir. 1954)

In reference to the fifth question presented by the petitioner, it is stated at page 13 of the petition:

> "All evidence obtained by search and seizure in violation of the Fourth Amendment to the Constitution is inadmissable in a criminal trial in a state (Mapp v. Ohio, 367 U.S. 643)."

An entirely different factual situation existed in the case of Mapp v. Ohio, and the case is to be distinguished from the instant case. In expressing the majority opinion of the court, Mr. Justice Clark, stated:

> "Because there can be no fixed formula, we are admittedly met with recurring questions of the reasonableness of searches, 'but less is not to be expected when dealing with a Constitution and, at any rate, (r)easonableness is in the first instance for the (trial court) * * * to determine United States v. Rabinowitz, 339 U.S. 56, 63, 94 L. ed. 653, 658, 70 S. Ct. 430 (1950)'."

It is the position of the respondent, in view of the factual situation presented in the case at bar, that the following language

of Mr. Justice Harlan, in the dissenting opinion, as follows, is applicable:

> "A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court, tested in some final appellate court and will go no further. In the comparatively rare instance, when a conviction is reviewed by us on due process grounds, we deal then with a finished product in the creation of which we are allowed no hand, and our task, far from being one of overall supervision, is, speaking generally, restricted to a determination of whether the prosecution was Constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversy before it. Such indeed is the Weeks Rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is impowered to impose this much-debated procedure on local courts, however, efficacious, we may consider the Weeks Rule to be as a means of securing Constitutional rights."

Notwithstanding the foregoing, respondent would ask this court to take notice of the fact that the only objection made by petitioner's attorney to the admissibility of the metal tube and stick was on the basis of "no proper foundation" made for their introduction. (T.R. 153) Neither at the trial, nor before the Supreme Court of South Dakota, was it contended that these exhibits were obtained through any illegal search and seizure.

It seems to be well settled law that constitutional rights as to searches and seizures may be waived. Zap v. U.S., 66 S.Ct. 1277, 328 U.S. 624, 90 L. ed. 1477, rehearing denied, 67 S. Ct. 107, 329 U.S. 824, 91 L.ed. 700, vacated 67 S.Ct. 857, 330 U.S. 800, 91 L. ed. 1259.

The South Dakota case of State v. Jackson, 250 N.W. 55 indicates that a defendant who has opportunity should so move in advance of the trial if he desires to avail himself at the time the objections based on the illegal search and seizure. See also, State v. Newharth, 50 S.D. 272, 209 N.W. 542. We need not remind

this court of the accepted rule in Federal Court of the necessity of a motion to suppress evidence before trial.

Respondent therefore contends that it is improper for the petitioner to first raise this question upon this appeal.

CONCLUSION

WHEREFORE, respondent prays that the petition be rejected and the writ of certiorari be denied.

Respectfully submitted,
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PROOF OF SERVICE

I, WALTER W. ANDRE, one of the attorneys for the respondent herein, and Member of the Bar of the Supreme Court of the United States, hereby certify that on the —— day of ——, 1965, I served copies of the foregoing Opposition to Petition for a Writ of Certiorari on Daniel J. Andersen, Attorney for petitioner, at his address, 639 Woodward Building, Washington, D.C., 20005, by mailing copies of said Opposition to Petition for Writ of Certiorari, duly addressed with airmal postage prepaid.

WALTER W. ANDRE

Attorney for Respondent